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8
9 **IN THE SUPREME COURT**

10 **STATE OF ARIZONA**

11 COMMENT TO PETITION TO AMEND) Supreme Court No. R-08-0006
12 RULES 38, 42 and 46 OF THE ARIZONA) COMMENT TO PETITION TO
13 SUPREME COURT) AMEND SUPREME COURT
14) RULES 38,42 AND 46
15)
16 _____)

17
18 The State Bar of Arizona respectfully petitions this Court, pursuant to Rule 28,
19 Rules of the Arizona Supreme Court, to amend Rule 38 of the Arizona Rules of the
20 Supreme Court as shown in Appendix A. A redline version comparing the original
21 and new language is set out at Appendix B.

22 **I. Proposed Rule 38**

23 At it's Friday April 25, 2008 meeting of the Board of Governors, the State Bar of
24 Arizona voted to submit to the Supreme Court a substitute for the proposed new Rule
25 38(g) of the Rules of the Supreme Court, concerning the registration of in-house
26 counsel. This substitute would replace the version originally submitted by the State
Bar in January. The text of the modified version is set forth in Appendix A.


1 This modified version is the product of discussions (that took place after the
2 filing of the Petition) with General Counsel for the largest 25 private corporations in
3 Arizona, who are affiliated with the American Corporate Counsel Association
4 (ACCA). Representatives from the Board of Governors contacted this group because
5 they were the group most likely to be impacted and to comment. As a result of these
6 efforts, both parties were able to work out a modified version of the Rule that now has
7 the full support of the aforementioned General Counsel. In fact, a representative of
8 this in-house counsel group appeared before the Board at the April 25 meeting, and
9 advised the Board that the group considered the revised Rule to represent the "best
10 practices" they had expected from the State Bar.

11
12 This modified proposed Rule only replaces the originally proposed new Rule
13 38(g), which accompanied the Petition, and not the proposed amendment to Rule ER
14 5.5 of the Arizona Rules of Professional Conduct, which we still are requesting and
15 which is not being changed.

16
17 **II. Conclusion**

18 The State Bar respectfully requests that the court amend Rule 38(g) and adopt
19 the proposed comment, as set out in Appendix A.

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21 DATED this 15th day of May, 2008.

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 15th day of May, 2008.

by: Kathleen A. Lundgren

APPENDIX A

PROPOSED AMENDMENT TO RULE 38(g) AND PROPOSED COMMENT

(proposed additional language shown by underscoring and proposed deletions shown by strike-through)

Rule 38(g). In-house Counsel

(g) In-house Counsel

(1) As used in this Rule, “in-house counsel” shall refer to an attorney who is employed within the State of Arizona as in-house counsel or a related position for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its parents, subsidiaries and/or affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services.

(2) A lawyer who is not a member of the State Bar of Arizona, but is currently a member in good standing of the bar of another state or the District of Columbia, or eligible to practice before the highest court in any state, territory or insular possession of the United States, and who is employed within the State of Arizona as in-house counsel, as hereinabove defined, may apply for an Arizona Certificate of Registration of In-House Counsel (“Registration Certificate”). A lawyer employed as in-house counsel who is admitted to practice in a jurisdiction outside of the United States, in accordance with the standards and requirements generally applicable to the practice of law in that jurisdiction, may also apply for a Registration Certificate.

(3) An applicant for a Registration Certificate shall:

- (a) file with the State Bar of Arizona its form of verified application for an Arizona Certificate of Registration of In-House Counsel;
- (b) furnish to the State Bar of Arizona a certificate from the state bar or from the clerk of the highest admitting court of each state, territory, or insular possession of the United States, or foreign jurisdiction, in which the applicant has been admitted to practice law certifying the current status of the applicant’s membership or eligibility to practice therein;
- (c) certify that the applicant has read and is familiar with the Arizona Rules of Professional Conduct; and
- (d) pay an application fee in an amount equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed.

(4) An attorney who is employed by an eligible organization as in-house counsel on the effective date of this Rule shall apply for a Registration Certificate within one hundred and eighty (180) days of that effective date. From and after the effective date of this Rule, any attorney who commences employment by an eligible organization as in-house counsel, shall apply for a Registration Certificate within ninety (90) days of the date of commencement of employment.

(5) On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this Rule, who continues to be employed as in-house counsel within the State of Arizona, shall renew the Registration Certificate, in the manner prescribed by the Board of Governors of the State Bar of Arizona for that purpose, and pay a renewal fee in an amount equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for that calendar year.

(6) Upon a determination by the State Bar of Arizona that the applicant has complied with the requirements of subpart (3) of this Rule, the State Bar shall issue to the applicant a Registration Certificate. The State Bar shall promptly notify any applicant if it determines that an application fails to comply with the requirements of subpart (3) of this Rule, and the applicant shall have thirty (30) days from the date of such notice in which to cure any deficiency. If the applicant fails to cure such deficiency within that thirty (30) day period, the application shall be deemed denied.

(7) Each lawyer issued a Registration Certificate shall report to the State Bar of Arizona, within thirty (30) days, any change in bar membership status in any jurisdiction of the United States, or in any foreign jurisdiction, where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal or state court or agency before which the applicant has been admitted to practice, or in any state in which the lawyer has rendered legal services while temporarily authorized under any rule or by admission *pro hac vice*.

(8) If there is a change in circumstances, and an attorney holding a current Registration Certificate becomes ineligible for such Certificate, the attorney shall notify the State Bar of Arizona of such change in writing within thirty (30) days. An attorney registered pursuant to this Rule who has become employed by a different eligible entity, but continues to meet all the requirements of this Rule, may apply for the issuance of an amended Registration Certificate to reflect that change.

(9) Except as provided in this Rule, the holder of a valid and current Registration Certificate shall be entitled to the benefits and responsibilities of active members of the State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar. A Registration Certificate shall not

authorize the registrant to provide legal services to any person or entity other than the one for which the registrant serves as in-house counsel, or its parents, subsidiaries or affiliates, or to engage in activities for which admission *pro hac vice* is required under Rule 38(a) of these Rules. A lawyer that has been issued a Registration Certificate under this Rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdictions(s) in which that lawyer is admitted to practice law.

(10) Notwithstanding the provisions of subpart (9) of this Rule, the holder of a Registration Certificate may participate in the provision of legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, Rule 38(e) of these Rules. A lawyer that has been issued a Registration Certificate under this Rule may also secure admission *pro hac vice* in Arizona by complying with the requirements of Rule 38(a) of these Rules.

(11) A lawyer's authority to practice as in-house counsel under a Registration Certificate issued pursuant to this Rule shall be suspended when the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation, before which that lawyer has been admitted to practice.

(12) A lawyer serving as in-house counsel in Arizona who fails to register pursuant to the provisions of this Rule shall be ineligible for admission *pro hac vice* in Arizona, and may be referred by the State Bar of Arizona to the Bar admission and/or disciplinary regulatory authority in any jurisdiction in which that lawyer has been admitted to practice of law.

(13) An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this Rule.

COMMENT

This Rule requires that lawyers not admitted to practice in Arizona, but who are employed in the State, by an entity or one of its specified affiliates, as "in-house counsel," as that term is defined, register annually with the State Bar of Arizona. The Rule's registration requirement is only intended to apply to those lawyers who are employed in that capacity by an entity conducting activities within the State, and whose principal office is located within the physical boundaries of the State. It is not intended to apply to those employed in such a capacity whose physical presence in the State is temporary or sporadic.

APPENDIX B

**REDLINE VERSION OF PROPOSED AMENDMENT TO RULE 38(g) AND
PROPOSED COMMENT**

(proposed additional language shown by underscoring and proposed deletions shown by strike-through)

Rule 38(g) In-house Counsel.

(1) As used in this Rule “In-house counsel” shall refer to is a person who is admitted to practice and is an active member in good standing as an attorney who or counselor at law in another state of the United States; is employed within the state of exclusively as in-house counsel in Arizona as in-house counsel or a related position for a single for-profit or a non-profit corporation(s), association(s) or other organizational entity(ies), which can include its parent, subsidiary and/or affiliates the business of which is lawful or is other than the practice of law or the provision of legal services.

(2) A lawyer in-house counsel, who is not a member of the State Bar of Arizona, but is currently a member in good standing of the bar of another state or the District of Columbia, or eligible to practice before the highest court in any state, territory or insular possession of the United States, and who is employed within the state of Arizona as in-house counsel, as herein above defined, or admitted to practice in a jurisdiction outside of the United States, in which the lawyer has successfully satisfied a character and fitness investigation, may apply for an Arizona Certificate of Registration of In-House Counsel (“Registration Certificate”). A lawyer employed as in-house counsel who is admitted to practice in a jurisdiction outside of the United States, in accordance with the standards and recommendations generally applicable to the practice of law in that jurisdiction, may also apply for a Registration Certificate, which will allow the lawyer to practice law as in-house counsel in this state. In-house counsel who is eligible for this Certificate must be employed in the state as a lawyer working exclusively for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its subsidiaries and affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services (hereinafter termed “Employer”). Such lawyers may make no court appearances or engage in other activities for which *pro hac vice* admission is required except as permitted by this Rule. The Registration Certificate does not authorize the provision of legal services to the Employer’s officers or employees in their personal capacities.

(3) An applicant for a Registration Certificate shall:

- (a) file with the State Bar of Arizona its form of verified application for an Arizona Certificate of Registration of In-House Counsel.;

(b) furnish to the State Bar of Arizona a certificate from the state bar or from the clerk of the highest admitting court in each state, territory, or insular possession of the United States, or foreign signed by the licensing authority in each jurisdiction in which the applicant is admitted to practice law; certifying the current status of the applicants membership or eiligibilty to practice therein: stating that the applicant is licensed to practice law and is an active member in good standing in each of those jurisdictions.

(c) file an affidavit on a form furnished by the State Bar of Arizona, from an officer, principal, or partner of the applicant's Employer who attests:

(1) that the applicant is employed exclusively as a lawyer to provide legal services exclusively to the Employer, which can include its subsidiaries and affiliates, and certifies that the applicant will remain an active member in good standing of at least one jurisdiction to which the applicant is admitted to practice law during the entire course of his or her employment;

(2) that the nature of the applicant's employment conforms to the requirements of this Rule; and

(3)(1) that the Employer shall notify the State Bar of Arizona within ten (10) days upon the termination of the applicant's employment.

(d)(c) certify that the applicant has read and is familiar with the Arizona Rules of Professional Conduct.

(e)(d) pay an application fee in anthe amount equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed. determined by the Board of Governors of the State Bar of Arizona.

(4) An attorney who is employed by an eligible organization as in-house counsel on the effective date of this Rule shall apply for a Registration Certificate within one hundred and eighty (180) days of that effective date. From and after the effective date of this Rule, any attorney who commences employment by an eligible organization as in-house counsel, shall apply for a Registration Certificate within ninety (90) days of the date of commencement of employment. The application must be filed within 60 days of the commencement of employment. During the period in which a fully completed application for a Registration Certificate is pending with the State Bar of Arizona, the applicant may be employed in the state as an in-house counsel on a

provisional basis by an Employer whose affidavit is filed pursuant to section 3(c)(1) above.

(5) ~~(5)~~ On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this Rule, who continues to be employed as in-house counsel within the State of Arizona, shall renew the Registration Certificate, in the manner prescribed by the Board of Governors of the State Bar of Arizona for that purpose, and pay a renewal fee in an amount equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for that calendar year.

(6) Upon a determination by the State Bar of Arizona that the applicant has complied with the requirements of subpart (3) of this Rule, the State Bar of Arizona shall issue to the applicant a Registration Certificate. The State Bar shall promptly notify any applicant if it is determined that an application fails to comply with the requirement of subpart (3) of this Rule, and if an application is rejected, the applicant shall be notified of the reason for the rejection. The applicant shall then have thirty (30) days from the date of such notice in which to cure any deficiency, the defect in the application and submit proof of cure. If the applicant fails to provide proof of cure such deficiency within that thirty (30) days period, the application shall be deemed denied. of the date of the rejection of the application, the applicant must file a new complete application for registration.

(6)(7) Each lawyer ~~The privileges and responsibilities of practice by in-house counsel issued a valid Registration Certificate in this state shall~~ report to the State Bar of Arizona, within thirty (30) days, any change in bar membership status in any jurisdiction of the United States, or in any foreign jurisdiction where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal or state court or agency before which the applicant has been admitted to practice, or in any state in which the lawyer has rendered legal services while temporarily authorized under any rule or by admission *pro hac vice* ~~include all privileges and responsibilities otherwise applicable to active members of the State Bar of Arizona, subject to the limitations of this Rule, including the limitations described in subpart (7) of this Rule.~~

(8) ~~In the event any lawyer~~ If there is a change in circumstances, and an attorney holding a current valid Registration Certificate becomes ineligible for such Certificate, the attorney shall notify the State Bar of ~~ceases to reside in Arizona~~ of such change in writing within thirty (30) days.. An attorney registered pursuant to this Rule who has become employed by a different eligible entity, but continues to meet all the requirements of this Rule, may apply for the issuance of an amended, ~~but retains a Registration Certificate to reflect that change, that lawyer will continue to be subject to the rules governing the practice of law in Arizona.~~

~~(7)(9) Except as provided in this Rule, the holder of a valid and current A lawyer that has been issued a Registration Certificate under this Rule shall be entitled to the benefits and responsibilities of active members of the State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar fulfill the requirements for mandatory continuing legal education of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. A Registration Certificate shall not authorize the registrant to A lawyer registered under this Rule shall practice exclusively for the Employer providing the affidavit required by subpart (3)(c)(1) of this Rule, and shall not offer or provide legal services) to any person or entity other than the one for which the registrant serves as in-house counsel, or its parents, subsidiaries or affiliates, or to engage in activities for which admission pro hac vice is required under Rule 38(a) of these Rules. A lawyer that has been issued a Registration Certificate under this Rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdictions(s) in which that lawyer is admitted to practice law, or advice to the public or hold himself or herself out as being so authorized, except as provided in subpart (9) of this Rule.~~

~~(8) Each lawyer issued a Registration Certificate shall report to the State Bar of Arizona, within ten (10) days, any change in employment, any change in bar membership status in any jurisdiction of the United States where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal court, state court or agency before which the applicant has been admitted to practice, or in any state in which the attorney has rendered legal services while temporarily authorized under any rule or by admission pro hac vice. An attorney registered pursuant to this Rule who has become employed by a different employer, but continues to meet all of the requirements of this Rule, may seek to transfer the attorney's Registration Certificate to the new employer. Both the attorney and the attorney's new employer shall immediately provide written notification to the State Bar of Arizona of that change in circumstance and file a new employer affidavit, within thirty (30) days of the date of the change of circumstance.~~

~~(9) (10) Notwithstanding the provisions of subpart (79) of this Rule, a lawyer registered under this Rule may participate in the provision of any and all legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, pro bono publico in Arizona offered under the auspices of organized legal aid societies or State Bar of Arizona projects, or provided under the supervision of a member of the State Bar of Arizona who is also working on the pro bono representation, as set out in Rule 38(c)~~

of these Rules. A lawyer that has been issued a Registration Certificate under this rule may also secure admission *pro hac vice* in Arizona by complying with the requirements of Rule 38(a) of these Rules.

(110) A lawyer's authority to practice as in-house counsel under a Registration Certificate issued pursuant to ~~as granted under this Rule~~ shall be automatically suspended when:

(a)employment by the Employer furnishing the affidavit required by this Rule is terminated, except for those lawyers applying for a certificate transfer under subpart (10)(a) of this Rule;

(b)the lawyer fails to comply with any provision of this Rule; or

(c)when the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction of the United States or by any federal court or agency or by any foreign nation before which the lawyer has been admitted to practice.

Any lawyer whose registration is suspended pursuant to subpart (10)(a) above shall be reinstated upon satisfactory evidence that the lawyer has a new Employer who qualifies under subpart 2 of this Rule. A notarized letter from the lawyer, accompanied by an affidavit furnished by the attorney's new Employer, shall suffice for reinstatement, provided that the lawyer attests that there are no other changes to the lawyer's eligibility as required by this Rule.

Any lawyer whose authority to practice is suspended under subparts (10)(b) or (c) of this Rule may be considered for reinstatement upon presentation of satisfactory evidence that the lawyer is fully compliant with all provisions of this Rule.

(11) On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this Rule must file an application for renewal of his or her Registration Certificate, on the form provided by the State Bar of Arizona for that purpose, and pay the renewal fee established by the Board of Governors of the State Bar of Arizona.

(12) A lawyer serving as in-house counsel in Arizona, who fails to register pursuant to the provisions of this Rule shall be:

(a)subject to professional discipline in this jurisdiction; and

(b)ineligible for admission *pro hac vice* in Arizona, and may be this jurisdiction; and

referred by the State Bar of Arizona to the Bar admission and/or disciplinary or regulatory authority in each jurisdiction in which that lawyer has been admitted to practice of law.

(13) A lawyer serving as in-house counsel in Arizona and to whom an Arizona Certificate of Registration of In-House Counsel has been issued, shall be identified as "Registered In-House Counsel" on all written communication and documentation, including but not limited to business cards and letterhead stationary.

(13 4) An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this rule.

COMMENT

This Rule requires that lawyers not admitted to practice in Arizona, but who are employed in the State, by an entity or one of its specified affiliates, as "in-house counsel," as that term is defined, register annually with the State Bar of Arizona. The Rule's registration requirement is only intended to apply to those lawyers who are employed in that capacity by an entity conducting activities within the State, and whose principal office is located within the physical boundaries of the State. It is not intended to apply to those employed in such a capacity whose physical presence in the State is temporary or sporadic.